

**Proposed Amendments
to the
California Code of Regulations
Title 23. Waters
Division 3. State Water Resources Control Board
and Regional Water Quality Control Boards
Chapter 18. Petroleum Underground Storage
Tank Cleanup Fund
Article 7. Underground Storage Tank Petroleum
Contamination Orphan Site Cleanup Fund**

**INITIAL
STATEMENT OF REASONS**

CHAPTER 18. Petroleum Underground Storage Tank Cleanup Fund
Article 7. Underground Storage Tank Petroleum Contamination Orphan
Site Cleanup Fund

Brownfields are abandoned or underused commercial or industrial properties, where the expansion or redevelopment is hindered by contamination. Brownfields vary in size, location, age, and past use. Many brownfields in California were former gasoline service stations where leaking underground storage tanks (USTs) containing petroleum products have caused, and in some cases continue to cause, impacts to soil and groundwater. These properties present public health and environmental impacts, as well as economic challenges, to the communities in which they are located.

In many cases, owners of these brownfield sites and other persons who are responsible for cleaning up the contamination (responsible parties) have abandoned the properties. Even if the owners and other responsible parties can be located, the high cost of remediation is an all-too-common impediment to actual cleanup. As a result, these properties sit idle or underutilized. The risk and cost associated with contamination at these sites discourage potential buyers from acquiring these sites. Thus, without viable responsible parties or purchasers who are willing to undertake UST removal and cleanup, the contamination at these brownfields continues to go unabated and threatens human health, safety, and the environment.

Pursuant to Chapter 774, Statutes 2004, \$10 million per fiscal year 2004-05, 2005-06, and 2006-07 was transferred from the Underground Storage Tank Cleanup Fund (USTCF) to the Underground Storage Tank Petroleum Contamination Orphan Site Cleanup Subaccount (OSCA) to address petroleum contamination from USTs at sites that qualify as brownfields. Effective January 1, 2008, the OSCA program was repealed. Therefore, the State Water Resources Control Board (State Water Board) proposes to repeal existing California Code of Regulations, title 23, division 3, chapter 18, article 7, section 2814.20 et seq., relating to the OSCA.

Chapter 616, Statutes of 2008 provides that \$10 million for each of the 2008-09, 2009-10, and 2010-11 fiscal years shall be transferred from the USTCF to an Underground Storage Tank Petroleum Contamination Orphan Site Cleanup Fund (Orphan Site Cleanup Fund) to address petroleum contamination from USTs at sites that qualify as brownfields. In order to implement Health and Safety Code¹ section 25299.50.2 enacted by Chapter 616, Statutes of 2008, which established the Orphan Site Cleanup Fund, the State Water Board proposes to adopt proposed California Code of Regulations, title 23, division 3, chapter 18, article 7, section 2814.20 et seq. Specifically, the proposed regulations define eligible sites, eligible applicants, and eligible costs and establish eligibility requirements, a priority system for paying eligible applicants, and funding limitations. The proposed regulations also define the types of costs that qualify for funding.

¹ All further statutory references are to the Health and Safety Code unless otherwise noted.

The proposed regulations generally duplicate the regulations for the OSCA, which are being repealed. The four major differences between the regulations for the OSCA and the proposed regulations for the Orphan Site Cleanup Fund are listed below.

- Unlike the regulations for the OSCA, which restricted payment requests to requests for \$5,000 or more, the proposed regulations allow payment requests to be submitted for costs of \$500 or more.
- The regulations for the OSCA include several provisions regarding performance-based contracts for cleanup grants. Under the proposed regulations, the Orphan Site Cleanup Fund will only issue time and material cleanup grants. Therefore, provisions regarding performance-based contracts, including the definitions of “performance-based contract” and “remediation milestone” are not included in the proposed regulations.
- Similar to the regulations for the OSCA, the proposed regulations establish a monetary cap of \$1.5 million per occurrence for grants from the Orphan Site Cleanup Fund. However, the proposed regulations also provide that any grants issued and reimbursed by the State Water Board from the OSCA shall be counted toward the total amount available per occurrence from the Orphan Site Cleanup Fund.
- The provisions governing the Orphan Site Cleanup Fund’s priority list are modeled after the regulations for the OSCA. However, the State Water Board has determined that those applicants to the Orphan Site Cleanup Fund who previously applied for a grant from the OSCA and either received a grant from the OSCA or were on the OSCA’s priority list at the time that the OSCA program was repealed, should receive higher priority than other applicants to the Orphan Site Cleanup Fund. In order for the applicant to receive this higher priority, the State Water Board must receive the applicant’s application on or before 45 days after the effective date of the proposed regulations.

The State Water Board did not rely upon technical, theoretical, or empirical studies, reports, or documents to amend these regulations. The State Water Board considered alternatives to the proposed regulatory action and determined that no alternatives would be more effective in carrying out the purpose for which the proposed regulations are intended or would be as effective or less burdensome. The proposed regulations do not mandate the use of specific technologies or equipment, nor do they duplicate or conflict with any federal law or federal regulation.

SECTION 2814.20. DEFINITIONS.

Specific Purpose and Necessity of the Proposed Action

1. **“Affiliates”** – Section 25299.50.2 authorizes the use of funds at sites where, among other things, a financially responsible party has not been identified to pay for remediation at the site. To accomplish the goals of section 25299.50.2, the pool of eligible applicants for this grant program should be large. However, the grant funds should not be available to persons who cause or contribute to the contamination at the site. Additionally, the funds should not be available to persons who have certain relationships with the person who caused or contributed to the contamination. The proposed definition of “affiliates” provides a non-exhaustive list of specific relationships that are included within the definition of “affiliates.” The proposed definition of “affiliates” is derived from section 25299.54, subdivision (h)(5). The State Water Board has determined that someone who is an affiliate of a person who causes or contributes to an unauthorized release should not be able to file an application to the Orphan Site Cleanup Fund. Otherwise, an ineligible applicant could have an affiliate file an application to the Orphan Site Cleanup Fund, because of their relationship, in an effort to circumvent eligibility requirements.
2. **“Applicant”** – The definition of “applicant” clarifies that a person who files an application to the Orphan Site Cleanup Fund is an applicant.
3. **“Causes or contributes to an unauthorized release”** – As stated earlier, funds from the Orphan Site Cleanup Fund should not be available to persons who cause or contribute to the contamination at the site. This includes UST operators and persons who own USTs for a significant period of time without properly permitting, closing, or removing the UST. If the UST owner or operator complied with UST regulatory requirements, including permitting requirements, then the UST owners and operators may be eligible for funding from the USTCF. This regulation specifies circumstances that amount to causing or contributing to an unauthorized release for purposes of the Orphan Site Cleanup Fund.
4. **“Economic activity”** – Section 25299.50.2 authorizes the use of funds at sites that meet the conditions described in section 25395.20, subdivision (a)(2), which defines a “brownfield.” Among other things, to qualify as a brownfield, the property must have previously been the site of an economic activity. The proposed definition of “economic activity” tracks section 25395.20, subdivision (a)(5), which defines “economic activity” as a governmental activity, a commercial, agricultural, industrial, or not-for-profit enterprise, or other economic or business concern.
5. **“Eligible site”** – Section 25299.50.2 authorizes the use of funds at sites that meet certain criteria. The site must qualify as a brownfield under section 25395.20, subdivision (a)(2). Thus, the site must be located in an urban area, must have been the site of an economic activity that is no longer in operation at that location, and the site must have been vacant or have had no occupant engaged in year-round

economically productive activities for a period of not less than 12 months before the date of submitting an application to the Orphan Site Cleanup Fund. Also, in accordance with section 25395.20, subdivision (a)(2)(B), a brownfield does not include any of the following: 1) sites listed, or proposed for listing, on the National Priorities List pursuant to section 105(a)(8)(B) of the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. Sec. 9601 et seq.); 2) sites that are or were owned or operated by a department, agency, or instrumentality of the United States; and 3) sites that are a contiguous expansion or improvement of an operating industrial or commercial facility, unless the site is a brownfield described in section 25395.20, subdivision (a)(6)(C). Section 25395.20, subdivision (a)(6)(C) describes contiguous expansions of operating industrial or commercial facilities that are owned or operated by a small business, certain non-profit corporations, or small business incubators. Therefore, contiguous expansions may qualify as eligible sites if they are owned or operated by one of these three types of entities identified in section 25395.20, subdivision (a)(6)(C).

Section 25299.50.2 specifically limits the expenditure of these funds to sites where petroleum contamination is the principal source of contamination at the site and the source of the petroleum contamination is, or was, a UST. The proposed definition of “eligible site” incorporates the substantive requirements from section 25299.50.2 and section 25395.20, which defines an eligible brownfield site.

6. **“Familial relationship”** – The proposed definition of “familial relationship” tracks the definition of “familial relationship” in section 25299.54, subdivision (h)(5)(C). As discussed earlier, the proposed regulations prohibit persons who cause or contribute to the unauthorized release, and affiliates thereof, from participating in the Orphan Site Cleanup Fund. Affiliates are persons who have familial relationships, fiduciary relationships, or relationships of direct or indirect control or shared interests. The proposed definition of “familial relationship” identifies specific relationships that meet the definition of a “familial relationship.”
7. **“Independent consultant and contractor”** – Section 2814.31 of the proposed regulations requires applicants to procure consultant and contractor services from qualified independent contractors and consultants. The proposed definition of “independent consultant and contractor” describes when a consultant or contractor at a site is independent from an Orphan Site Cleanup Fund applicant, responsible party, or prospective buyer. The definition clarifies who applicants may contract with to perform response actions at the site in order to receive payment from the Orphan Site Cleanup Fund.
8. **“Infill development”** – Section 2814.27 of the proposed regulations establishes a priority system for Orphan Site Cleanup Fund applications. If the State Water Board determines that sufficient funding to meet the demand for Orphan Site Cleanup Fund grants will not be available in a given year, the State Water Board will calculate a priority score. One factor to be considered is the potential for the project to result in affordable inner city housing or otherwise promote inner city infill development. The

proposed definition of “infill development” clarifies the circumstances under which an applicant may receive priority points.

9. **“No longer in operation”** – Section 25299.50.2 authorizes the use of funds at sites that, among other things, meet the definition of a “brownfield” under section 25395.20, subdivision (a)(2). One criterion to qualify as a brownfield under that section is that the site must have been the site of an economic activity that is no longer in operation at that location. The proposed definition of “no longer in operation” tracks section 25395.20, subdivision (a)(12), which defines the term “no longer in operation” as an economic activity that is, or previously was, located on a property that is not conducting operations on the property of the type usually associated with the economic activity.
10. **“Operation and maintenance”** – Section 25322 of chapter 6.8 defines “remedy” and “remedial action” and includes site operation and maintenance. (See discussion for “Response Actions” for rationale of using applicable definitions from chapter 6.8 of the Health and Safety Code.) The proposed definition of “operation and maintenance” tracks the statutory definition of “operation and maintenance” in chapter 6.8. It is necessary to clarify that operation and maintenance activities are part of the remediation process and describe activities that qualify as operation and maintenance.
11. **“Orphan Site Cleanup Fund”** – The proposed definition of “Orphan Site Cleanup Fund” provides the abbreviation for the Underground Storage Tank Petroleum Contamination Orphan Site Cleanup Fund.
12. **“Person”** – The proposed definition of “person” lists the entities that may apply to the Orphan Site Cleanup Fund.
13. **“Project”** – Section 2814.27 of the proposed regulations establishes a priority system for Orphan Site Cleanup Fund applications. If the State Water Board determines that sufficient funding to meet the demand for Orphan Site Cleanup Fund grants will not be available in a given year, the State Water Board will calculate a priority score. One factor to be considered is the potential for the project to result in affordable inner city housing or otherwise promote inner city infill development. The proposed definition of “project” clarifies that the project includes both the response action and the planned future development of the eligible site. The State Water Board believes that the primary objective of the Orphan Site Cleanup Fund is to cleanup unauthorized releases of petroleum at brownfield sites. Another objective is to make productive use of vacant or underutilized sites within urban areas. Cleanup is the first step to the redevelopment process. When considering whether an application should receive “smart growth” priority points, it is appropriate and consistent with the legislative intent to consider the cleanup and potential for revitalization.

14. **“Public agency”** – The proposed definition of “public agency” clarifies which governmental entities are considered public agencies, and therefore eligible to apply to the Orphan Site Cleanup Fund.
15. **“Remedy” or “remedial action”** – Section 25299.50.2 authorizes the expenditure of funds for the costs of response actions at sites that meet certain criteria. Section 25299.50.2 is contained within Health and Safety Code, chapter 6.75, which governs the administration of the USTCF. Within chapter 6.75, cleanup activities at petroleum UST sites are consistently referred to as corrective action. Section 25299.50.2, however, refers to “response actions” and incorporates by reference the definition of a brownfield that is contained in Health and Safety Code, chapter 6.8, article 8.5 (Cleanup Loans and Environmental Assistance to Neighborhoods). Article 2 of chapter 6.8 contains definitions that govern article 8.5, unless the context requires otherwise. Section 25323.3 of article 2 of chapter 6.8 provides that:

“Response,” “respond,” or “response action” have the same meanings as defined in Section 9601(25) of the federal act (42 U.S.C. Sec. 9601(25)). The enforcement and oversight activities of the department and regional board are included within the meaning of “response,” “respond,” or “response action.”

The referenced section, 42 U.S.C. section 9601, is within the Comprehensive Environmental Response, Compensation and Liability Act or CERCLA. Under 42 U.S.C. section 9601(25), respond or response means remove, removal, remedy, and remedial and include enforcement activities related thereto. Thus, including removal and remedial actions in the definition of “response actions” is consistent with the legislative intent of section 25299.50.2.

Health and Safety Code, chapter 6.8, article 2, section 25322 provides that:

“Remedy” or “remedial action” includes all of the following:

- (a) Those actions that are consistent with a permanent remedy that are taken instead of, or in addition to, removal actions in the event of a release or threatened release of a hazardous substance into the environment, as further defined by section 101(24) of the federal act (42 U.S.C. Sec. 9601(24)), except that any reference in section 101(24) of the federal act (42 U.S.C. Sec. 9601(24)) to the President, relating to determinations regarding the relocation of residents, businesses, and community facilities shall be a reference to the Governor and any other reference in that section to the President shall, for the purposes of this chapter, be deemed a reference to the Governor, or the director, if designated by the Governor.
- (b) Those actions that are necessary to monitor, assess, and evaluate a release or a threatened release of a hazardous substance.
- (c) Site operation and maintenance.

The proposed definition of “remedy” or “remedial action” incorporates aspects of the definitions contained in Health and Safety Code, chapter 6.8, article 2 and CERCLA that are applicable to petroleum UST cleanups.

16. **“Remove” or “removal”** – Section 25299.50.2 authorizes the expenditure of funds for the costs of response actions at sites that meet certain criteria. Section 25299.50.2 is contained within Health and Safety Code, chapter 6.75, which governs the administration of the USTCF. Within chapter 6.75, cleanup activities at petroleum UST sites are consistently referred to as corrective action. Section 25299.50.2, however, refers to “response actions” and incorporates by reference the definition of “brownfield” that is contained in Health and Safety Code, chapter 6.8, article 8.5 (Cleanup Loans and Environmental Assistance to Neighborhoods). Article 2 of chapter 6.8 contains definitions that govern article 8.5, unless the context requires otherwise. Chapter 6.8, article 2, section 25323.3 provides that:

“Response,” “respond,” or “response action” have the same meanings as defined in section 9601(25) of the federal act (42 U.S.C. Sec. 9601(25)). The enforcement and oversight activities of the department and regional board are included within the meaning of “response,” “respond,” or “response action.”

The referenced section, 42 U.S.C. section 9601, is within the Comprehensive Environmental Response, Compensation and Liability Act or CERCLA. Under 42 U.S.C. section 9601(25), respond or response means remove, removal, remedy, and remedial and include enforcement activities related thereto. Thus, including removal and remedial actions in the definition of “response actions” is consistent with the legislative intent of section 25299.50.2.

Chapter 6.8, article 2, section 25323 provides that:

“Remove” or “removal” includes the cleanup or removal of released hazardous substances from the environment or the taking of other actions as may be necessary to prevent, minimize, or mitigate damage which may otherwise result from a release or threatened release, as further defined by section 101(23) of the federal act (42 U.S.C. Sec. 9601(23)).

The definition of “remove” or “removal” in the proposed regulations incorporates aspects of the definitions contained in Health and Safety Code, chapter 6.8, article 2 and CERCLA that are applicable to petroleum UST cleanups.

17. **“Response actions”** – Section 25299.50.2 authorizes the expenditure of funds for the costs of response actions at sites that meet certain criteria. Section 25299.50.2 is contained within Health and Safety Code, chapter 6.75, which governs the administration of the Fund. Within chapter 6.75, cleanup activities at petroleum UST sites are consistently referred to as corrective action. Section 25299.50.2, however, refers to “response actions” and incorporates by reference the definition of a

brownfield that is contained in Health and Safety Code, chapter 6.8, article 8.5 (Cleanup Loans and Environmental Assistance to Neighborhoods). Article 2 of chapter 6.8 contains definitions that govern article 8.5, unless the context requires otherwise. Chapter 6.8, article 2, section 25323 provides that:

“Response,” “respond,” or “response action” have the same meanings as defined in section 9601(25) of the federal act (42 U.S.C. Sec. 9601(25)). The enforcement and oversight activities of the department and regional board are included within the meaning of “response,” “respond,” or “response action.”

The referenced section, 42 U.S.C. section 9601, is within the Comprehensive Environmental Response, Compensation and Liability Act or CERCLA. Under 42 U.S.C. section 9601(25), respond or response means remove, removal, remedy, and remedial and include enforcement activities related thereto. Thus, including removal and remedial actions in the definition of response actions is consistent with the legislative intent of section 25299.50.2.

The proposed definition of “response actions” also includes “corrective action” as defined in section 25299.14:

“Corrective action” includes, but is not limited to, evaluation and investigation of an unauthorized release, initial corrective actions measures, as specified in the federal act, and any actions necessary to investigate and remedy any residual effects remaining after the initial corrective action. Except as provided in the federal act, “corrective action” does not include actions to repair or replace an underground storage tank or its associated equipment.

USTCF regulations, section 2804 defines “corrective action” as:

any activity necessary to investigate and analyze the effects of an unauthorized release; propose a cost-effective plan to adequately protect human health, safety, and the environment and to restore or protect current and potential beneficial uses of water; and implement and evaluate the effectiveness of the activity(ies). Corrective action does not include any of the following activities:

- (a) detection, confirmation, or reporting of the unauthorized release; or
- (b) repair, upgrade, replacement or removal of an underground storage tank or residential tank.

The term “corrective action” essentially includes activities to investigate, remediate and monitor the effects of an unauthorized release. These activities are similar to removal actions and remedial actions under chapter 6.8 of the Health and Safety Code. Since the term “corrective action” is typically used with petroleum UST cleanups throughout California and the regulated community and regulatory

agencies are familiar with the term and what it includes, it is helpful to include that in the definition of “response actions.”

The term “response actions,” which includes removal and remedial actions, under chapter 6.8 of the Health and Safety Code and CERCLA is broader than the term “corrective action.” There is a substantial amount of case law describing and defining “removal” and “remedial actions” under CERCLA. Response actions include professional fees and costs that are directly related to removal actions and remedial actions. (*In re: Combustion, Inc.*, 968 F. Supp. 1112 (W.D. La 1996); *Nutrasweet Co. v. X-L Engineering Corp.*, 926 F. Supp. 767 (ND. Ill 1996).) Courts have allowed the recovery of professional fees that are closely tied to the actual cleanup, significantly benefit the entire cleanup, and serve a statutory purpose by facilitating a prompt and effective cleanup. (*In re: Combustion, supra.*)

Response costs include costs of supervision by an applicant of response actions. (*T&E Industries, Inc. v. Safety Light Corp.* (1988) 680 F. Supp. 696, 707.)

Response costs also include costs of UST removal if there is an unauthorized release or a threat of an unauthorized release. (*United States v. 150 Acres of Land* (2000) 204 F.3d 698, 710.) Removing the source or a threatened source will mitigate the effects of the unauthorized release and is appropriate and consistent with the goals of the Orphan Site Cleanup Fund to include it in the definition of “response actions.”

There are certain costs that courts have consistently rejected as response actions under CERCLA. These include costs of environmental audits or pre-purchase site investigations, unless performed in response to an unauthorized release or a threatened release. (See *Pennsylvania Urban Development Corporation v. Golen* (1989) 708 F. Supp. 669; *Amland Properties Corp. v. Aluminum Company of America* (1989) 711 F.Supp. 784.) This is consistent with the definition of “corrective action” contained in chapter 6.75 of the Health and Safety Code and the USTCF regulations. Essentially, the corrective action process begins after the unauthorized release has been detected, confirmed or reported. (See USTCF regulations, § 2804, definition of “corrective action.”)

Other costs that have not been considered costs of response actions by courts are economic losses and damages, including damages for lost business and diminution in property value. (*Artesian Water Company v. New Castle County* (1987) 659 F. Supp. 1269, *Wehner v. Syntex Corporation* (1987) 681 F. Supp. 651.) The funding for the Orphan Site Cleanup Fund is limited and paying for these types of losses and damages would reduce the amount that is available for actual cleanup costs. The goal of the Orphan Site Cleanup Fund is to cleanup brownfield sites. Limiting Orphan Site Cleanup Fund grants to actual cleanup and specific activities that are directly related to cleanup activities serve the overall objective of the Orphan Site Cleanup Fund.

The proposed definition of “response actions” clarifies which types of costs are eligible for payment under the Orphan Site Cleanup Fund.

18. **“Responsible party”** – Section 25299.50.2 authorizes the use of funds at sites that meet certain criteria, one of which is that a financially responsible party has not been identified to pay for remediation at the site. It is necessary to clarify under what circumstances a person may be considered a responsible party. The term “responsible party” is used throughout chapter 6.7 of the Health and Safety Code to refer to persons who are liable for corrective action at petroleum UST sites. The term is defined in California Code of Regulations, title 23, division 3, chapter 16 (UST Cleanup regulations), section 2720 as follows:

- (1) Any person who owns or operates an underground storage tank used for the storage of any hazardous substance;
- (2) In the case of any underground storage tank no longer in use, any person who owned or operated the underground storage tank immediately before the discontinuation of its use;
- (3) Any owner of property where an unauthorized release of a hazardous substance from an underground storage tank has occurred; and
- (4) Any person who had or has control over a underground storage tank at the time of or following an unauthorized release of a hazardous substance.

Since section 25299.50.2 does not contain a definition of responsible party, it is reasonable to conclude that the Legislature must have intended this long-standing definition of “responsible party” be used for purposes of the Orphan Site Cleanup Fund. The proposed definition of “responsible party” clarifies who will be considered a responsible party for purposes of the Orphan Site Cleanup Fund.

19. **“Small business”** – The Orphan Site Cleanup Fund is limited to sites that among other things, qualify as brownfields under section 25395.20. Excluded from the definition of “brownfield” is a site that is a contiguous expansion or improvement of an operating industrial or commercial facility, unless certain specified criteria are met. Sites of contiguous expansions are eligible under section 25395.20(a)(6)(C) if the site is owned or operated by a small business, certain non-profit corporations, or small business incubators. Therefore, contiguous expansions may qualify as eligible sites if the site is owned or operated by one of these three types of entities identified in section 25395.20, subdivision (a)(6)(C).

The proposed definition of “small business” tracks the definition of “small business” in chapter 6.8. To qualify as a small business, among other things, the business, together with its affiliates, must have 100 or fewer employees. The California Department of General Services (DGS), Office of Small Business Procurement and Contracts certifies small businesses. The definition of “small business” contained in

chapter 6.8 is apparently based in part upon the definition used by the DGS. (See Cal. Code Regs., tit. 2, ch. 3, § 1896.12, subd. (a).) To qualify as a small business under these DGS regulations, among other things, the business, together with its affiliates, must have 100 or fewer employees. (*Id.*, § 1896.12, subd. (a)(5)(A). Section 1896.12, subdivision (d)(7) also establishes factors to be considered by the DGS when determining if two or more businesses are related. It is appropriate to use this definition of “affiliates” for purposes of defining a “small business.” Since section 25299.50.2 incorporates the definition of “brownfield” (and therefore the definition of “small business”) from chapter 6.8, using the DGS definition is most consistent with the legislative intent.

20. **“Urban area”** – Section 25299.50.2 authorizes the use of funds at sites that meet the conditions described in section 25395.20, subdivision (a)(2), which defines a “brownfield.” Among other things, to qualify as a brownfield, the property must be located in an urban area. Section 25395.20, subdivision (a)(19) defines an urban area as either of the following:

(A) The central portion of a city or a group of contiguous cities with a population of 50,000 or more, together with adjacent densely populated areas having a population density of at least 1,000 persons per square mile.

(B) An urbanized area as defined in paragraph (2) of subdivision (b) of Section 21080.7 of the Public Resources Code.

Public Resources Code section 21080.7 was repealed in 2002 and was not in effect when section 25299.50.2 was enacted. For purposes of implementing section 25299.50.2, the State Water Board is using the definition of “urban area” in subparagraph (A) only.

The first step in applying the proposed definition of “urban area” is to determine if the site is located in a city or a group of contiguous cities that have a population of 50,000 or more. The statute limits urban areas to cities, so the site must be located in an incorporated area. If the city alone does not meet the population requirement, then it is appropriate to look at contiguous cities to determine if, as a group, the population requirement is met. If the population requirement is not met in a city or the group of contiguous cities, the population of the area adjacent to the city can be considered so long as the area has a population density of at least 1,000 persons per square mile. Even though adjacent, densely populated areas may be used to meet the population requirement, the site must be located in an incorporated area.

If a city or group of cities meet the population requirement, then it must be determined if the site is located in the central portion of the city or group of contiguous cities. The word “center” has many meanings, including a point, area, person, or thing that is most important or pivotal in relation to an indicated activity, interest, or condition or a region of concentrated population. (Merriam Webster’s Collegiate Dictionary, Tenth Edition.) The State Water Board believes that it has a

reasonable amount of latitude in determining what constitutes the central portion of a city.

SECTION 2814.21. OTHER DEFINITIONS.

Specific Purpose and Necessity of the Proposed Action

Proposed section 2814.21 provides that if a term is used in proposed article 7, but is not defined, then the definition of the term (if any) contained in USTCF regulations, section 2804 shall apply. However, if the term in proposed article 7 is used in a context that requires some other interpretation than the definition contained in USTCF regulations, section 2804, then the definition in section 2804 shall not apply. This is a standard provision that assists with interpreting regulations.

SECTION 2814.22. TYPES OF GRANTS.

Specific Purpose and Necessity of the Proposed Action

Section 25299.50.2 authorizes the expenditure of funds for the costs of response actions at sites that meet certain criteria. In general terms, response actions include activities necessary to investigate and evaluate the effects of an unauthorized release, develop a plan for actual remediation, implement the remediation plan, monitor the effectiveness of the remediation plan implementation, and any activities throughout the process that are necessary to remove the effects of the unauthorized release or mitigate the impacts of the unauthorized release. Response actions include activities that are described as “corrective action” in chapter 6.7 and the UST Cleanup regulations. Since the term “corrective action” is typically used with respect to petroleum UST cleanups throughout California and the regulated community and regulatory agencies are familiar with the term and what it includes, it is helpful to refer to corrective action and the various phases of the corrective action process when describing the two grants available under the Orphan Site Cleanup Fund.

UST cleanups are typically performed in two basic phases, the assessment phase and the actual cleanup and monitoring phase. Applicants may request either or both types of grants, depending upon their particular cleanup project. Since the Orphan Site Cleanup Fund is essentially a continuation of the OSCA program that was effective January 1, 2005, the proposed regulations for the Orphan Site Cleanup Fund provide for payment of eligible costs that were incurred on or after January 1, 2005. Some applicants may have already completed the assessment phase by January 1, 2005, and are looking for financial assistance for the cleanup phase of the project. The proposed regulation specifies that an applicant may apply for both an assessment grant and a cleanup grant on a single application.

Funds in the Orphan Site Cleanup Fund are limited (\$10 million per year for three fiscal years). The State Water Board must manage the Orphan Site Cleanup Fund efficiently to ensure that the funds are used effectively and not tied up by projects that are not moving ahead in a timely manner. This proposed regulation provides that an applicant may apply for a cleanup grant before a corrective action plan is complete and approved, but may not be awarded the grant until the corrective action plan is completed and approved by the appropriate regulatory agency. When the State Water Board “awards” a grant to an applicant, the State Water Board essentially commits the grant amount to the applicant so that the applicant has some assurance that the funds will be available to perform response actions. Committing funds to one applicant depletes the amount that can be committed to another applicant. Thus, before committing cleanup grant funds, the applicant must demonstrate that the first phase of the remediation process (i.e., assessment) is complete. Otherwise, funds could be committed to an applicant, to the detriment of other worthy applicants. The Orphan Site Cleanup Fund should not be administered in a manner that unnecessarily ties up funds at the expense of other worthy cleanup projects that are ready to progress.

To summarize, the phased approach for the grants allows the State Water Board to manage the limited funds in the Orphan Site Cleanup Fund in an efficient manner.

SECTION 2814.23. ELIGIBLE APPLICANTS.

Specific Purpose and Necessity of the Proposed Action

Section 25299.50.2 authorizes the use of funds at sites where, among other things, a financially responsible party has not been identified to pay for remediation at the site. To accomplish the goals of section 25299.50.2, the pool of eligible applicants for the Orphan Site Cleanup Fund should be large. However, the Orphan Site Cleanup Fund should not be available to persons who caused or contributed to the unauthorized release in a significant way. The proposed regulations strike a balance between these two competing policy goals. Any person who has caused or contributed to the unauthorized release at the site, or any affiliate thereof, may not participate in the program. If a person operated the subject UST or owned the leaking UST for an unreasonable period of time before properly permitting, closing, or removing the UST, that person is considered to have caused or contributed to the unauthorized release. (The proposed regulations provide an exception, however, where the UST owner was unaware of the hidden USTs despite reasonable diligence.) The State Water Board expects that persons who are interested in cleaning up a brownfield site using funds from the Orphan Site Cleanup Fund will purchase the site, including fixtures (e.g., UST). In those cases, the person will become the owner of the UST. However, if the person closes, removes, or properly permits the UST within a reasonable period of time after becoming the owner, the person will not be deemed to have caused or contributed to the unauthorized release. This gives an applicant a reasonable amount of time, after becoming the UST owner, to comply with UST regulatory requirements and not jeopardize its status as an eligible applicant.

The State Water Board believes that it is appropriate to exclude persons from this program if they are affiliates, as defined, with a person who caused or contributed to the unauthorized release, as defined. Otherwise, an ineligible person (e.g., owned the USTs and the real property for 20 years) could simply have a business partner or a family member apply to the Orphan Site Cleanup Fund. The State Water Board believes that the Orphan Site Cleanup Fund was designed to encourage cleanup at brownfield sites without conferring a significant benefit on persons who caused or contributed to the problem.

The proposed regulations also exclude persons who are eligible to receive reimbursement for corrective action costs from the Fund. The Orphan Site Cleanup Fund is very limited in financial resources and duration. As indicated earlier, the Orphan Site Cleanup Fund receives \$10 million per year for three years. If an applicant qualifies for the USTCF, which is not similarly limited, the applicant should utilize the USTCF for financing the cleanup. This is an efficient way to manage the limited amount of money dedicated to the Orphan Site Cleanup Fund.

With brownfield sites, the goals are to cleanup the site and start the revitalization process. Redevelopment projects may be impeded if potential Orphan Site Cleanup Fund applicants must wait many years to receive financial assistance for cleanup expenses from the USTCF. The State Water Board believes that the benefit of expediting cleanup and redevelopment at these brownfield sites outweighs the potential burden on the limited funds in the Orphan Site Cleanup Fund and that the proposed regulation strikes a good balance between these competing objectives.

SECTION 2814.24. ELIGIBILITY REQUIREMENTS.

Specific Purpose and Necessity of the Proposed Action

1. **Section 2814.24, subdivision (a)** – Section 25299.50.2 allows expenditure of funds at sites where, among other things, a financially responsible party has not been identified. Section 2814.24, subdivision (a) limits the financial viability test to responsible parties other than the applicant. The term “responsible party” is broad and includes UST owners and property owners. Thus, there may be eligible applicants to the Orphan Site Cleanup Fund that technically fall into the definition of a responsible party (e.g., a short-term owner of a UST or a person who owns real property but never operated the USTs.) If the otherwise eligible applicant is willing and able to cleanup the property, and in the process becomes a responsible party, the applicant’s ability to pay for the cleanup should not be an obstacle to obtain funds from the Orphan Site Cleanup Fund. The State Water Board expects private developers, non-profit groups, and redevelopment agencies to apply for these funds, and requiring these types of groups to show that they are without financial resources to conduct the cleanup would defeat the purpose of the Orphan Site Cleanup Fund. The State Water Board believes that there are four general factors that should be

considered when determining if a party who is responsible for the unauthorized release, other than the applicant, is financially able to pay for response actions to remediate the harm caused by the unauthorized release.

The first factor is the estimated cost of the response actions. The State Water Board recognizes that applicants will be submitting applications where the applicant may have little data about the unauthorized release. Therefore, it may be difficult or even impossible for the applicant to provide a reasonable cost estimate for the expected response actions. The State Water Board, having implemented the USTCF for 17 years, has the experience of processing thousands of claims with petroleum UST releases and will usually be able to assist applicants in developing a reasonable cost estimate based upon information that is available to the applicant. This proposed regulation allows the State Water Board to provide this assistance if the applicant is unable to provide a reasonable estimate.

The second factor that will be assessed is the responsible party's income and assets. To implement the legislative directive of only spending funds from the Orphan Site Cleanup Fund where there is no financially responsible party, it is necessary to consider the responsible party's income and assets.

The third factor that will be evaluated is whether the responsible party has received or will receive insurance coverage that may provide financial assistance to the responsible party to conduct remediation, which impacts the responsible party's overall ability to pay for cleanup at the site. Thus, any insurance coverage will be evaluated when considering if the responsible party can pay for cleanup at a site. If the applicant or responsible party reports potential insurance coverage, but claims that coverage is denied or disputed by the insurance carrier, the State Water Board will consider those arguments as well.

The fourth factor that will be evaluated is whether the responsible party has received financial assistance from other sources such as programs that provide financial assistance to cleanup brownfield sites. One such program is administered by the United States Environmental Protection Agency. There may be other programs sponsored by local agencies or redevelopment agencies. The State Water Board believes that it is appropriate to consider any of these types of funds that the responsible party has received or may receive when determining whether the responsible party is financially able to pay for remediation at the site.

2. **Section 2814.24, subdivision (b)** – Proposed section 2814.24, subdivision (b) pertains to applications that are filed by two or more joint applicants. As explained above, if an otherwise eligible applicant is willing and able to cleanup the property, and in the process becomes a responsible party, the applicant's ability to pay for the cleanup should not be an impediment to receiving funds from the Orphan Site Cleanup Fund. However, this general rule (not considering the applicant's ability to pay for response actions) should not be used to circumvent statutory conditions imposed by the Legislature (i.e., expenditure of funds at sites where a financially

responsible party has not been identified). Proposed section 2814.24, subdivision (b) is necessary to preclude financially responsible parties from banding together as applicants to circumvent this statutory limitation. The State Water Board recognizes that there may be cases where multiple responsible parties file as joint applicants and it is not appropriate to consider the financial resources of the non-primary joint applicants. The joint applicants have the burden of demonstrating to the State Water Board that considering their financial ability to perform response actions would be unreasonable or inequitable under the facts and circumstances surrounding the application.

3. **Section 2814.24, subdivision (c)** – Section 25299.50.2 authorizes the expenditure of funds at sites where, among other things, a financially responsible party has not been identified. The State Water Board recognizes, however, that it may be difficult for applicants to locate responsible parties, and even if they are located, it may be difficult to demonstrate that the responsible party is not financially able to pay for remediation. The State Water Board further recognizes that in many cases financial information is confidential and cannot generally be accessed without the cooperation of the responsible party. Therefore, the proposed regulations require the applicant to make reasonable efforts to obtain the specified information from the responsible party. The State Water Board also recognizes that financial information or a company's financial status may be available through reporting systems such as Dunn and Bradstreet, and expects applicants to utilize these types of tools where appropriate.

SECTION 2814.25. GRANT CONDITIONS AND LIMITATIONS.

Specific Purpose and Necessity of the Proposed Action

1. **Section 2814.25, subdivision (a)** – Section 25299.50.2 authorizes the expenditure of funds for response actions at sites that meet certain criteria. Among other things, petroleum must be the principal source of contamination and the contamination must have originated from a petroleum UST. The funds in the Orphan Site Cleanup Fund are limited (\$10 million per year for three years). Proposed section 2814.25, subdivision (a) limits the reimbursement of response action costs to those that are both reasonable and necessary. Given the limited funds and the desire to cleanup as many brownfields as possible, it is appropriate and consistent with the legislative intent to limit reimbursement to those costs that are both reasonable and necessary.

Under the regulations that were adopted to implement the OSCA, the State Water Board reimbursed eligible costs that were incurred on and after January 1, 2005. Since the Orphan Site Cleanup Fund is essentially a continuation of the OSCA program that was effective January 1, 2005, the State Water Board believes that it is appropriate for the Orphan Site Cleanup Fund to also reimburse eligible costs that were incurred on and after January 1, 2005.

When a regulatory agency confirms an unauthorized release from a petroleum UST and requires further action, the regulatory agency will issue a cleanup directive. Local agencies typically issue these orders under section 25296.10. Regional Water Quality Control Boards may direct cleanups under either that section or division 7 of the Water Code. Proposed section 2814.25, subdivision (a) requires that the regulatory agency direct cleanup and it is sufficiently broad to include directives issued under the Health and Safety Code or the Water Code.

The proposed regulations also limit reimbursement to situations where the underlying response actions are necessary to protect human health, safety and the environment, and are performed in accordance with applicable provisions of the Health and Safety Code or the Water Code. This section ensures that funds from the Orphan Site Cleanup Fund are only used for actions that are necessary to protect human health, safety, and the environment. The State Water Board recognizes that many of the sites that are accepted into the program have plans for redevelopment. There may be certain activities and corresponding costs that are necessary for redevelopment, but that are not necessary to protect human health, safety, and the environment. This section is necessary to clarify that funds from the Orphan Site Cleanup Fund may only be used to pay for response actions that are necessary for the protection of human health, safety, and the environment.

When the State Water Board adopted regulations to implement the OSCA, the State Water Board believed that performance-based contracts would motivate contractors or consultants to clean up the site within the grant lifetime. Under a performance-based contract, a grantee must meet remediation milestones prior to being paid. Due to the difficulties involved with implementing performance-based contracts, the OSCA only issued time and material cleanup grants. Additionally, it has been the USTCF's experience that claimants have significant problems reaching the final remediation milestones. Failure to meet the final remediation milestones results in claimants not being reimbursed for long periods of time, which can slow down cleanup progress. Therefore, the State Water Board will only issue time and material cleanup grants.

2. **Section 2814.25, subdivision (b)** – To receive an assessment grant, the applicant is not required to own the eligible site. This allows applicants to assess the site and evaluate their risks before becoming the real property owner and responsible party. Applicants are required, however, to submit all site assessments and investigation reports, workplans, and corrective action plans that are available to the applicant. Both the State Water Board and the regulatory agency must be made aware of the efforts that have already occurred at the site. This information will be used by the State Water Board to negotiate grant agreements. The Orphan Site Cleanup Fund should not pay for response actions that have already been done at the site.

Additionally, after assessing the site, an applicant may decide not to acquire the site and proceed with cleanup activities. Even though the applicant who assessed the site and obtained funding from the Orphan Site Cleanup Fund for assessment

activities does not intend to proceed with the cleanup phase, it is important that any and all site assessments, investigation reports, workplans, and corrective action plans that are reasonably available to the applicant be made available to any other persons who may be interested in completing response actions at the site. The best way to ensure that these persons have access to the site information is to make it available at the regulatory agency and the State Water Board. This section requires Orphan Site Cleanup Fund applicants to submit these reports to the State Water Board and the applicable regulatory agency as a condition of receiving funding.

Proposed section 2814.25, subdivision (b) requires that an applicant be the equitable or legal owner of the eligible site before the applicant may receive payment under a cleanup grant. This requirement does not apply to public agencies. If an applicant receives funds from the Orphan Site Cleanup Fund to cleanup the site, the applicant must demonstrate that it has a substantial stake in the property (equitable or legal ownership). This section requires that the applicant obtain either legal ownership or equitable ownership before the applicant receives payment under a cleanup grant. When parties enter into a purchase and sale agreement (sales agreement) of real property, the buyer becomes the equitable owner of the property after the sales agreement is fully executed. An escrow is typically established and the parties frequently address environmental problems during the escrow process. There are risks involved when purchasing contaminated properties. After the purchaser becomes the legal owner of the property, the purchaser becomes a responsible party. If the regulations required legal ownership of the site before cleanup funds could be received, then some parties (potential applicants) may not be willing to take the risk of pursuing cleanup. Allowing the payment of cleanup funds to equitable owners provides more flexibility and options to the purchaser and seller, promoting the cleanup of brownfield sites.

3. **Section 2814.25, subdivision (c)** – The regulations that were adopted to implement the OSCA established a monetary cap of \$1.5 million per occurrence for grants from the OSCA. (See USTCF regulations, § 2804 for the definition of “occurrence.”) This is the cap that applies to claims submitted to the Fund. The cost of remediating a typical petroleum UST contaminated site rarely exceeds \$1.5 million, so this limit should give applicants assurance that sufficient funding will be available to cleanup the site. An applicant should not receive more than a total of \$1.5 million per occurrence in grants by the State Water Board from the OSCA and the Orphan Site Cleanup Fund. Therefore, proposed section 2814.25, subdivision (c) provides that any grants issued and reimbursed by the State Water Board from the OSCA shall be counted toward the total amount available per occurrence from the Orphan Site Cleanup Fund.
4. **Section 2814.25, subdivision (d)** – Proposed section 2814.25, subdivision (d) limits the amount that may be awarded to an applicant and affiliates of applicants in any fiscal year. The limit is \$3 million per fiscal year. The purpose of this limitation is to award grants to numerous different applicants (or groups of applicants) in any given fiscal year. The State Water Board may waive this limitation if doing so would

provide for an equitable and timely use of funds. The waiver will need to be considered and applied on a case-by-case basis.

SECTION 2814.26. DOUBLE PAYMENT.

Specific Purpose and Necessity of the Proposed Action

Proposed section 2814.26 prohibits an applicant from receiving a double payment on account of any cost of response action. Proposed section 2814.26 incorporates USTCF regulations, section 2812.3 by reference. Section 2812.3 uses terms applicable to article 4 of chapter 18. This proposed regulation replaces those terms with terms that apply under the Orphan Site Cleanup Fund, such as “applicant,” the “Orphan Site Cleanup Fund,” and “response actions.”

An applicant receives a double payment when the applicant receives a payment or other consideration for the same costs from both the Orphan Site Cleanup Fund and another source. For example, this issue could arise if the applicant initiates litigation against a potentially responsible party over contamination resulting from an unauthorized release from a petroleum UST and the parties subsequently settle the litigation. The Orphan Site Cleanup Fund is intended to provide financial assistance to cleanup brownfield sites so that the sites can be used for productive purposes. Allowing applicants to receive duplicative compensation for the same costs would create a significant windfall for applicants. If an applicant is receiving money for response actions from some other source, funds from the Orphan Site Cleanup Fund should be preserved for other worthy applicants who, without the assistance of the Orphan Site Cleanup Fund, may not be able to complete the cleanup.

Proposed section 2814.26 differs from USTCF regulations, section 2812.3 in that a reduction in the cost to acquire an interest in real property will not be considered compensation from another source for purposes of the OSCA program. The State Water Board believes that treating any purchase-price reduction as a potential double payment would create another impediment to cleaning up and redeveloping brownfield sites.

Since the State Water Board will follow the same basic procedure set forth in USTCF regulations, section 2812.3 when evaluating potential double payments under the Orphan Site Cleanup Fund, section 2812.3 is fully explained below.

USTCF regulations, section 2812.3 establishes the State Water Board’s procedures for determining whether a claimant that has received compensation (such as a settlement payment) from other sources has received a double payment. (Since settlement agreements are the most common vehicle by which applicants receive compensation from another source, settlement agreements will be used to illustrate how the State Water Board will evaluate double-payment issues.) Absent an express allocation of settlement monies in the settlement agreement, the State Water Board bases its

determination regarding the purposes of the compensation on the terms of the settlement agreement or underlying complaint. Even when the evidence supports a finding that all or a portion of the settlement monies are for corrective action or other costs reimbursable by the USTCF, the State Water Board reviews the claimant's documentation of actual ascertainable and non-reimbursable costs to which the settlement payment reasonably may be attributed in order to reduce (or offset) the amount of money that is determined to be a potential double payment. Typically, the State Water Board does not allow an offset for the claimant's attorneys' fees paid to resolve the litigation unless the applicant could have recovered attorneys' fees in the underlying litigation. Attorneys' fees are not generally recoverable absent statutory authorization.

Based upon section 25299.54, subdivision (g), the USTCF regulations clarify the circumstances when an insurance company may incur costs on behalf of a claimant or advance costs to a claimant without violating the double payment prohibition. The USTCF regulations grandfather those claims that had a letter of commitment before June 30, 1999, provided the claimant is required to reimburse the insurer for any costs the insurer paid while awaiting reimbursement from the USTCF. For claims after June 30, 1999, the State Water Board must analyze the insurance contract to ensure that the contract: 1) explicitly coordinates benefits with the USTCF; 2) requires the applicant to maintain eligibility with the USTCF; and 3) requires the applicant to reimburse the insurer for costs paid by the insurer while awaiting reimbursement from the USTCF.

When a claimant obtains a settlement or judgment for eligible costs, another party has paid costs that the USTCF would otherwise reimburse. Drawing on the common law common fund doctrine, the State Water Board has determined in precedential State Water Board Orders WQ 96-04-UST and WQ 98-05-UST that it is equitable to recognize the benefit that a claimant has obtained for the USTCF when the claimant recovers money for costs that the USTCF would otherwise reimburse. The amount that the State Water Board has determined to be a potential double payment under section 2812.3, subdivision (c) represents the benefit to the USTCF.

Subdivision (f) of section 2812.3 establishes procedures for the USTCF to bear a fair share of the claimant's costs of obtaining a settlement payment or judgment for eligible corrective action costs. The State Water Board first must calculate the USTCF's fair share of the claimant's costs to obtain the settlement proceeds or judgment. The USTCF's fair share shall be equal to the lesser of either: 1) the claimant's actual legal costs to obtain the settlement proceeds or judgment in proportion to the ratio of the costs the Fund would otherwise have reimbursed to the total settlement or judgment amount; or 2) 30 percent of the benefit to the USTCF.

In those instances when the actual legal fees and costs determine the USTCF's fair share, the State Water Board has determined that it is appropriate to fix the USTCF's share based on the ratio of the USTCF's benefit to the claimant's total recovery. A claimant's settlement may include both costs the USTCF would have paid and other damages (such as lost profits); however, the invoices for the attorneys' fees and costs

would not clearly distinguish between attorneys' fees that reduced the USTCF's reimbursement and attorneys' fees that were incurred solely to the claimant's benefit. As a result, the regulation determines the USTCF's fair share to be the actual, total attorneys' fees and costs reduced in proportion to the ratio of the costs the USTCF would otherwise have reimbursed to the total settlement or judgment amount. For example, if the benefit to the USTCF represented 40 percent of the claimant's total recovery, the USTCF would pay 40 percent of the attorneys' fees and legal costs.

In the remaining fair-share cases, the State Water Board chose 30 percent as an appropriate contribution based on an analysis of the above-mentioned orders. In addition, 30 percent is a percentage commonly used by the courts in common fund cases.

The State Water Board will then deduct the fair share amount from the amount the State Water Board has determined to be a potential double payment. This is advantageous to the claimant because the amount that USTCF staff considers to be a double payment is reduced and the amount that the claimant can receive from the USTCF is increased. The proposed regulation incorporates the procedures established in the above-mentioned State Water Board orders.

In addition, section 2812.3, subdivision (f) prohibits the USTCF from bearing a fair share of the costs if the person paying the monies to the claimant is eligible to file a claim against the USTCF and has not waived its ability to file a claim. In this situation, the paying party may file a claim against the USTCF for the monies it has paid to the original claimant. Accordingly, there is no benefit to the USTCF because the USTCF must reimburse the paying party's eligible costs.

Finally, section 2812.3, subdivision (f) prohibits the USTCF from bearing a fair share if the claimant has already been wholly compensated for its costs. Otherwise, the claimant would receive a windfall if it has already been compensated for all of its costs and then receives a common fund contribution from the USTCF.

SECTION 2814.27. PRIORITY RANKING.

Specific Purpose and Necessity of the Proposed Action

1. **Section 2814.27, subdivision (a)** – Proposed section 2814.27, subdivision (a) establishes a priority system for ranking eligible Orphan Site Cleanup Fund applications received on or before 45 days after the effective date of the regulations.

Some applicants who applied for and received a grant from the OSCA did not receive a large enough grant to finish assessment and cleanup at the eligible site. Proposed section 2814.27, subdivision (a) provides that if these applicants apply for a grant from the Orphan Site Cleanup Fund on or before 45 days after the effective date of the regulations, their applications will receive the highest priority. This will

ensure that on-going response work at these sites can continue. These applications will be ranked according to their ranking on the OSCA priority list, adopted on April 5, 2006, and amended effective November 22, 2006, February 9, 2007, March 23, 2007, May 14, 2007, and October 16, 2007.

Additionally, due to the limited funds available in the OSCA, some applicants were on the last amendment to the OSCA priority list, Amendment Number 6, effective October 16, 2007, but did not receive a grant. Work at these sites has been delayed as a consequence of the lack of funding. If these applicants apply for a grant from the Orphan Site Cleanup Fund on or before 45 days after the effective date of the regulations, their applications will receive second priority. These applications will be ranked according to their ranking on Amendment Number 6 of the OSCA priority list.

Finally, all other applications received by the State Water Board on or before 45 days after the effective date of the regulations will be given third priority. The applications will be randomly ranked, unless there are insufficient funds to meet demands on the Orphan Site Cleanup Fund, as discussed in more detail below.

2. **Section 2814.27, subdivision (b)** – Proposed section 2814.27, subdivision (b) establishes a priority system for ranking eligible Orphan Site Cleanup Fund applications that are received more than 45 days after the effective date of the regulations. The applications will be ranked on a first-come, first-served basis, unless there are insufficient funds to meet demands on the Orphan Site Cleanup Fund, as discussed in more detail below. All applications that are received more than 45 days after the effective date of the regulations will be ranked in accordance with the date that they are received. If more than one application is received on the same date, the applications will be randomly ranked to determine the priority.
3. **Section 2814.27, subdivision (c)** – If the State Water Board determines that sufficient funding to satisfy the demand for Orphan Site Cleanup Fund grants will not be available in a given fiscal year, the State Water Board will transition to a ranking system that prioritizes applications based upon three factors. Given the short lifespan of this program, the State Water Board wants to encourage applicants to submit timely applications and therefore rank applications based upon the date that the application is received. However, if the limited funding is not sufficient to meet all of the demand in a fiscal year, the State Water Board believes that the funding should first go to the cleanup projects that meet other worthy objectives that are consistent with the redevelopment of brownfield sites.

If this priority system is triggered, the proposed regulations require the State Water Board to rank the applications based upon the following factors: 1) water quality concerns – 40 percent; 2) income level of applicable census tract – 30 percent; and 3) smart growth potential of proposed project – 30 percent.

Section 25299.50.2 authorizes the use of these funds for response actions at contaminated sites and section 25299.77 authorizes the State Water Board to adopt,

amend, or repeal regulations to implement this program. It is the State Water Board's position that the water quality factor should be afforded the most weight when ranking eligible applications. Therefore, if the unauthorized release that is the subject of the Orphan Site Cleanup Fund application is located within 1,000 feet of a drinking water well or a surface water body used as a source of drinking water, then the application will receive 40 of the possible 100 priority points.

The second factor relates to the income level in the census tract in which the eligible site is located. An application will receive 30 priority points if the eligible site is located in a census tract with median household income (MHI) of less than 80 percent of the statewide MHI based on the most recent census data collected by the United States Census of the Bureau.

The third factor incorporates smart growth principles in that the application will receive 30 priority points if there is potential for the project (cleanup and planned future development) to result in development of affordable inner city housing or otherwise promote inner city infill development. The State Water Board believes that awarding priority points for inner city projects is consistent with the objectives of section 25299.50.2.

SECTION 2814.28. Orphan Site Cleanup Fund APPLICATION REQUIREMENTS.

Specific Purpose and Necessity of the Proposed Action

1. **Section 2814.28** – Proposed section 2814.28 specifies what information is required on an Orphan Site Cleanup Fund application in order for the State Water Board to determine if all eligibility requirements for Orphan Site Cleanup Fund are met and the priority ranking of the application. The State Water Board will not require applicants to use a specific application form; however, for the convenience of the applicant, the State Water Board will supply an optional form in an organized, consistent format.
2. **Section 2814.28, subdivision (a)** – Proposed section 2814.28, subdivision (a) requires an applicant to submit standard information about the applicant. The State Water Board must know the entity type because certain rules apply to private entities that do not necessarily apply to public agencies. The State Water Board needs basic contact information so that correspondence and other communications can be exchanged when processing the application. Since the State Water Board may be disbursing funds to the applicant that are reportable to taxing authorities, the applicant must give the State Water Board its tax identification number.
3. **Section 2814.28, subdivision (b)** – Proposed section 2814.28, subdivision (b) requires any joint applicants identified on the application to supply the same information as proposed section 2814.28, subdivision (a) requires an applicant to supply.

4. **Section 2814.28, subdivision (c) – (f)** – Proposed section 2814.28, subdivisions (c) through (f) require the submission of information relating to the site and the contamination that are the subject of the application. Section 25299.50.2 and the proposed regulations authorize expenditure of funds at sites where, among other things: 1) petroleum is the principal source of contamination at the site; and 2) the source of petroleum contamination is, or was, a UST. The required information will enable the State Water Board to determine if the requirements stated above are met.

A site map, depicting the location of the UST and any other sources of contamination at the site and a listing of other known or potential sources of contamination will assist the State Water Board in deciding if the contamination originated from a petroleum UST at the site or an adjacent site that may also be a source of contamination. It is necessary to know when the UST at the eligible site was removed to determine if it is, or was, the source of the contamination. For example, if the UST was removed 40 years ago, yet the petroleum contamination has characteristics of a more-recent release, there may be issues of whether the petroleum contamination is from the former UST or some other source.

5. **Section 2814.28, subdivision (g) – (i)** – Proposed section 2814.28, subdivision (g) through (i) impose several eligibility conditions for receiving grant funds from the Orphan Site Cleanup Fund. For example, the regulatory agency responsible for overseeing response actions must direct cleanup at the site and the response actions must be necessary to protect human health, safety, and the environment. (See proposed section 2814.25, subdivisions (a)(2) and (a)(3).) Proposed section 2814.28, subdivision (g) through (i) require the applicant to submit basic contact information about the regulatory agency that is overseeing response actions at the site so that State Water Board staff may contact the regulatory agency regarding the contamination at the site. Subdivisions (h) and (i) require the applicant to submit information about the unauthorized release and response actions at the site so that the State Water Board may evaluate the eligibility of the site and response action costs.
6. **Section 2814.28, subdivision (j)** – Proposed section 2814.28, subdivision (j) requires the applicant to provide explanations and submit information that demonstrates that the site that is the subject of the application meets the definition of an “eligible site” contained in proposed section 2814.20.
7. **Section 2814.28, subdivision (k)** – Proposed section 2814.28, subdivision (k) requires the applicant to submit explanations and information that demonstrate that the applicant meets the requirements for an eligible applicant in proposed section 2814.23.
8. **Section 2814.28, subdivision (l)** – Proposed section 2814.28, subdivision (l) requires the applicant to submit information indicating whether a financially

responsible party has been identified, other than the applicant (if the applicant also happens to be a responsible party), to pay for response actions at the site.

9. **Section 2814.28, subdivision (m)** – Proposed section 2814.28, subdivision (m) requires the applicant to submit information that will allow the State Water Board to determine the priority ranking of an application in the event that the priority system described in proposed regulation section 2814.27, subdivision (c) is triggered.
10. **Section 2814.28, subdivision (n)** – Proposed section 2814.28, subdivision (n) requires the applicant to certify that costs for response actions for which the applicant will be seeking payment were incurred on or after January 1, 2005. The proposed regulations limit payment to eligible costs of response actions incurred on or after January 1, 2005. Applicants will not typically submit invoices for response action costs, which show when the costs were incurred, until later in the application process. Thus, to evaluate eligibility at the application stage, the applicant will need to declare whether or not the costs were incurred on or after January 1, 2005.
11. **Section 2814.28, subdivision (o)** – Proposed section 2814.28, subdivision (o) requires the applicant to certify that all applicable eligibility requirements are satisfied.
12. **Section 2814.28, subdivision (p)** – Proposed section 2814.28, subdivision (p) requires the applicant to submit a copy of any agreement where a person agrees to incur costs on behalf of an applicant. It is necessary for the State Water Board to review the actual agreement to ensure that the person incurring the costs is actually incurring them on behalf of the applicant and not on the person's own behalf. Further, review of the actual document is necessary to ensure that the applicant is not receiving an inappropriate double payment.
13. **Section 2814.28, subdivision (q)** – Proposed section 2814.28, subdivision (q) requires the applicant to submit any information or documentation that is reasonably required by the State Water Board to determine the eligibility or priority of the application or the amount that may be paid under an Orphan Site Cleanup Fund grant. This provision is necessary because sites are unique and circumstances surrounding the sites, responsible parties, applicants, and response actions vary. The State Water Board must make certain findings before making funding determinations, and this regulation gives the State Water Board reasonable latitude when requesting information that will allow it to make certain findings.

SECTION 2814.29. PRIORITY LIST.

Specific Purpose and Necessity of the Proposed Action

If an application is eligible for the Orphan Site Cleanup Fund, the application will be placed on the priority list. Proposed section 2814.29 describes the State Water Board's

process for compiling and maintaining the priority list. The State Water Board will update and adopt the priority list at least once a year. The State Water Board will place on a revised priority list only those applications determined eligible prior to adoption of the revised priority list. After an eligible applicant and the State Water Board enter into a grant agreement, the application will be removed from the priority list. Additionally, consistent with the first come, first served priority-ranking system, when the State Water Board revises the priority list by adding eligible applications, the new applications will be ranked below the applications that were on the priority list before the revision.

SECTION 2814.30. GENERAL PROCEDURES FOR PAYMENT.

Specific Purpose and Necessity of the Proposed Action

1. **Section 2814.30, subdivision (a)** – Proposed section 2814.30, subdivision (a) describes the procedure for making payments pursuant to an Orphan Site Cleanup Fund grant. This provision provides that after the State Water Board determines that an application is eligible, the applicant and the State Water Board shall enter into a grant agreement. This provision specifies information that the applicant must provide when entering into grant agreements with the State Water Board. In particular, for assessment grants and cleanup grants, the applicant must provide a proposed scope of work and a budget. For cleanup grants, the applicant must also submit three responsive proposals or bids in accordance with proposed section 2814.31. These documents are necessary so that the State Water Board may enter into a grant agreement with the applicant that uses funds from the Orphan Site Cleanup Fund to pay for reasonable and necessary costs of response actions.
2. **Section 2814.30, subdivision (b)** – Proposed section 2814.30, subdivision (b) provides that the applicant may begin submitting payment requests after the grant agreement is executed by the State Water Board and the applicant. The grant agreement commits a certain amount of funds to the applicant. As the remediation progresses and the applicant incurs response action costs, the applicant may request reimbursement for its eligible costs.

When the State Water Board adopted regulations to implement the OSCA, the State Water Board decided that it was necessary to restrict payment requests to requests for \$5,000 or more in order to manage and control the number of payment requests. Experience has shown that this restriction was set at a higher monetary amount than necessary for managing and controlling the number of payment requests. Additionally, a \$5,000 restriction may pose difficulties for some applicants with limited funds available to do assessment and cleanup response work. Based on experience, the State Water Board has determined that it is appropriate to restrict payment requests to requests for \$500 or more in order to manage and control the number of payment requests.

3. **Section 2814.30, subdivision (c)** – Proposed section 2814.30, subdivision (c) specifies information that the applicant must submit along with a request for payment. The State Water Board must obtain and review this standard information to ensure that funds from the Orphan Site Cleanup Fund are only used for costs of eligible response actions that are both reasonable and necessary.
4. **Section 2814.30, subdivision (d)** – Proposed section 2814.30, subdivision (d) provides that within 60 days of receipt of a properly-documented payment request, the State Water Board will either pay the eligible costs or inform the applicant of the basis(es) for rejecting the costs. The State Water Board recognizes that many applicants may defer payment to their contractors until they are paid by the Orphan Site Cleanup Fund, so the State Water Board understands the need for timely reimbursement. The State Water Board may only pay for eligible costs, however, so if the payment request is deficient and additional information is required, the 60-day time frame will not start until the payment-request package is complete.
5. **Section 2814.30, subdivision (e)** – Proposed section 2814.30, subdivision (e) requires applicants to pay their consultants and contractors for costs reimbursed by the Orphan Site Cleanup Fund within 30 days of receiving reimbursement from the Orphan Site Cleanup Fund. If the applicant does not pay the contractor within the 30-day period, the applicant must return the funds to the State Water Board immediately. It is necessary to encourage timely payment to contractors so that cleanups progress. The State Water Board recognizes, however, that applicants may have legitimate disputes with contractors and consultants performing work at the site. If the applicant decides it is necessary to withhold payment from a contractor, the applicant should not gain any benefit or use the funds for any purpose other than paying the contractor whose costs have been reimbursed by the Orphan Site Cleanup Fund. Thus, applicants are required to return the payment until the dispute between the applicant and the contractor is resolved.
6. **Section 2814.30, subdivision (f)** – Proposed section 2814.30, subdivision (f) requires an applicant to repay an overpayment to the State Water Board within 30 days of the State Water Board's request for repayment. Overpayments result from various scenarios. An overpayment may arise out of something as simple as a math or clerical error, or it could arise from a situation where the State Water Board makes a payment to an applicant, but the applicant fails to pay the applicable contractor or return it to the State Water Board.

SECTION 2814.31. BIDDING REQUIREMENTS.

Specific Purpose and Necessity of the Proposed Action

1. **Section 2814.31, subdivision (a)** – Proposed section 2814.31, subdivision (a) requires applicants to follow applicable state laws and regulations in procuring contractor and consultant services. The Orphan Site Cleanup Fund is available to

public entities, which are subject to procurement rules and procedures. This provision ensures that all applicants, including public entities, follow procurement laws. This provision also requires that the services be obtained from qualified independent consultants and contractors. The State Water Board believes that applicants should be required to use contractors and consultants that have no relationship to anyone who stands to benefit, either directly or indirectly, from the Orphan Site Cleanup Fund. These beneficiaries include the applicant, responsible parties, and prospective buyers of the eligible site. Maintaining independence between the applicant and a contractor provides a check and balance and is another tool to keep costs of response actions under control, which is necessary for a program that has limited funding.

2. **Section 2814.31, subdivision (b)** – Proposed section 2814.31, subdivision (b) requires local governmental entities to comply with applicable public contract requirements including the requirements contained in Public Contract Code, division 2, part 3, section 20100 et seq. This part of the Public Contract Code specifically governs contracting by local agencies and is worth highlighting. Applicants that are not local agencies may be subject to other procurement laws and they are required to comply with applicable procurement laws under proposed section 2814.31, subdivision (a).
3. **Section 2814.31, subdivision (c)** – Proposed section 2814.31, subdivision (c) provides that the applicant is not required to submit multiple bids or proposals when submitting the initial application to the Orphan Site Cleanup Fund. The State Water Board expects that many Orphan Site Cleanup Fund applicants may not be in a position to commence with response actions unless their financial resources (including funds from the Orphan Site Cleanup Fund) are relatively certain. Thus, it may not be uncommon for applicants to delay the bidding process until they assess their likelihood of receiving funds from the Orphan Site Cleanup Fund. Also, even though an application is accepted and placed on the priority list, depending upon the demand for funds from the Orphan Site Cleanup Fund and the number of other applications, the State Water Board may not be able to commit funds from the Orphan Site Cleanup Fund to a particular applicant for a significant amount of time after approving the application. However, it is necessary for the applicant to submit bids or proposals before the State Water Board enters into a cleanup grant agreement with the applicant. The Orphan Site Cleanup Fund may only be used to pay reasonable and necessary costs of response actions so it is necessary to review competitive bids and proposals when the State Water Board is agreeing to a cleanup grant amount.
4. **Section 2814.31, subdivision (d)** – The State Water Board expects most applicants to comply with bidding requirements; however, proposed section 2814.31, subdivision (d) allows the State Water Board to waive the multiple-bid requirement if the State Water Board finds that the requirement is unnecessary, unreasonable, or impossible to comply with under the circumstances pertaining to a particular application.

SECTION 2814.32. EFFECT OF PLACEMENT ON PRIORITY LIST; MANAGEMENT OF PRIORITY LIST AND PAYMENTS.

Specific Purpose and Necessity of the Proposed Action

1. **Section 2814.32, subdivision (a)** – Proposed section 2814.32, subdivision (a) provides that the State Water Board commits to the applicant to pay for eligible costs of response actions when the grant agreement is executed, not when the application is deemed eligible and placed on the priority list. Applications that are determined eligible are placed on the priority list in accordance with their ranking. The State Water Board will move through the list as the level of funding provides. When the State Water Board determines that sufficient funding is available to fund a certain application, the State Water Board will notify the applicant and begin negotiating the grant. In the grant agreement, the State Water Board will commit a certain amount of funding to the applicant for the response actions covered by the grant agreement.
2. **Section 2814.32, subdivision (b)** – Proposed section 2814.32, subdivision (b) provides that applications on the priority list will generally be processed and paid according to the ranking of the application, but that the State Water Board may modify the ranking of applications or the order of processing, payment, and approval of applications under certain circumstances. As explained earlier, applications are ranked on a first-come, first-served basis. If, however, the State Water Board determines that sufficient funding is not available to meet the demand for Orphan Site Cleanup Fund grants in any fiscal year, then the proposed regulations provide that the State Water Board will transition to a system that ranks applications based upon specified factors. Proposed section 2814.32, subdivision (b) allows the State Water Board to modify the ranking of applications if the State Water Board needs to transition to the priority system described in proposed section 2814.27, subdivision (c).

In general, applications will be processed, approved, and paid in accordance with their respective priority rankings. Even though an application had a higher ranking on the priority list, a lower-ranked application may actually receive payment earlier because cleanup at the corresponding site is progressing faster. Also, there could be a delay in approving a higher-ranked application because of missing documentation while lower-ranked applications are complete and able to be approved by the State Water Board. It would be inefficient to hold up approval of a lower-ranked application while waiting for information on a higher-ranked application.

SECTION 2814.33. REMOVAL FROM THE PRIORITY LIST AND RESUBMISSION OF APPLICATIONS.

Specific Purpose and Necessity of the Proposed Action

1. **Section 2814.33, subdivision (a)** – Proposed section 2814.33, subdivision (a) describes the situations where an application may be removed from the priority list. This provision provides that an application may be removed if the application is not in compliance with any of the applicable requirements of proposed article 7, Health and Safety Code, chapter 6.7, UST Cleanup regulations, or any provision of the Water Code under which the applicant is required to take response actions for an unauthorized release. At the time the State Water Board is first considering an application, the information may indicate that the application is eligible so the application is placed on the priority list. While on the list, circumstances may change that render the application ineligible (e.g., the applicant becomes affiliated with someone who caused or contributed to the unauthorized release). This provision authorizes the removal of the application from the priority list if the application no longer meets all eligibility requirements of proposed article 7. Also, this provision authorizes the State Water Board to remove an application if the applicant is subject to cleanup requirements (under Health and Safety Code, chapter 6.7 and implementing regulations or the Water Code) and fails to comply with them. The State Water Board expects cleanup to progress at a reasonable pace, but also realizes that the pace is sometimes dependent on financial resources.

This provision also allows the State Water Board to remove an application from the priority list if the applicant fails to provide necessary documentation or information or refuses to provide access to the eligible site to a regulatory agency. If an application is on the priority list and funds are available to commit to the application, the State Water Board and applicant will begin negotiating a grant agreement. Certain information may be necessary to complete the grant agreement and if the applicant is unwilling or unable to provide the information, the State Water Board must have the authority to remove the application from the priority list. There may also be situations where regulatory agencies are called upon to assist the State Water Board with verifying eligibility criteria. For example, the applicant may claim that the petroleum contamination resulted from a UST at the site rather than an existing aboveground storage tank (AST) and the State Water Board relies upon this and accepts the application. Because of the complexity of the site, the State Water Board may request the applicable regulatory agency to inspect the site to confirm certain factual representations made by the applicant. If the applicant refuses access to the regulatory agency thereby precluding the State Water Board from verifying certain facts, the State Water Board needs the authority to remove the application from the priority list.

Additionally, this provision allows the State Water Board to remove an application from the priority list if the application contains a material error. For example, when submitting an application, the applicant may have believed and represented in good faith that the petroleum contamination resulted from a former UST at the eligible site. After the application was approved and placed on the priority list, the applicant discovers that the petroleum contamination resulted from an AST at the site, which renders the application ineligible. In this example, the error on the initial application

was material (changed the outcome of eligibility) and the State Water Board must have the authority to remove the application from the priority list because it does not actually meet eligibility requirements.

2. **Section 2814.33, subdivision (b)** – Proposed section 2814.33, subdivision (b) allows an applicant to resubmit an application if the applicant has corrected the condition that was the basis for removal. For example, if the applicant failed to comply with cleanup directives and its application was removed in accordance with proposed section 2814.33, subdivision (a)(1), the applicant may resubmit the application after coming back into compliance with cleanup directives. If the State Water Board accepts the resubmitted application, the application's priority ranking is based on the date that the State Water Board determines that the resubmitted application is eligible. Therefore, if an application is removed, it loses its initial priority and a resubmitted application will be ranked lower than complete applications that were received before the State Water Board made its determination on the resubmitted application. An applicant may not resubmit an application if the application was initially removed from the priority list because it contained a material error and the error was a result of misrepresentation or fraud or other misconduct on the part of the applicant. If an applicant intentionally misstates material facts on an application and the State Water Board later discovers that the representations were intentional or the result of some other misconduct, the application should be barred from the Orphan Site Cleanup Fund. The State Water Board will be reviewing numerous Orphan Site Cleanup Fund applications and must rely upon the veracity of statements and documents that comprise the application. It is necessary to discourage the submission of false statements or information in the applications.

SECTION 2814.34. VERIFICATION OF APPLICATIONS.

Specific Purpose and Necessity of the Proposed Action

Proposed section 2814.34 requires the applicant to verify under penalty of perjury that all statements, documents, and certifications contained in or accompanying the application are true to the best of the applicant's knowledge. This regulation also provides that if an applicant discovers information that creates a material error in any statement or document previously certified, then the applicant shall submit the new, accurate information within 30 days of discovering the new information. The State Water Board will be reviewing numerous applications and a significant amount of supporting documentation and will need to rely upon the accuracy of representations made as part of the application. It is necessary to specify that it is the applicant's duty to provide accurate information and correct any information that later turns out to be inaccurate.

SECTION 2814.35. INTENTIONAL OR RECKLESS ACTS; DISQUALIFICATION OF APPLICATIONS.

Specific Purpose and Necessity of the Proposed Action

1. **Section 2814.35, subdivision (a)** – Proposed section 2814.35, subdivision (a) provides that response costs that result from the gross negligence or the intentional or reckless acts of the applicant or an agent or representative of the applicant are not eligible for funding from the Orphan Site Cleanup Fund. Funds from the Orphan Site Cleanup Fund are grant funds and they are limited (\$10 million per year for three fiscal years). They should not be used for unauthorized releases and corresponding costs that result from gross negligence or recklessness. This provision is necessary to exclude payment for costs from the Orphan Site Cleanup Fund that arise out of these situations.
2. **Section 2814.35, subdivision (b)** – Proposed section 2814.35, subdivision (b) authorizes the State Water Board to deny any application submitted by an applicant if the applicant submitted an application to the Orphan Site Cleanup Fund that contained a material error that resulted from misrepresentation, fraud, or other misconduct on the part of the applicant. When reviewing applications, the State Water Board must rely upon statements and information provided by applicants. If an applicant misrepresents a fact on an application for a particular site in order to create eligibility (e.g., contamination resulted from a UST rather than from an AST), the actual facts (contamination stemmed from an AST) would result in ineligibility for that application anyway. In other words, there is no real penalty for misrepresenting the fact on the application. With this proposed regulation, if an applicant provided a fraudulent statement concerning a material fact on a particular application, any other applications submitted by the applicant for other unrelated sites would also be barred from participating in the Orphan Site Cleanup Fund. This provision is necessary to deter applicants from making misrepresentations to gain access to the Orphan Site Cleanup Fund.

SECTION 2814.36. OVERPAYMENT; REPAYMENT.

Specific Purpose and Necessity of the Proposed Action

Proposed section 2814.36 governs overpayments and repayments to the Orphan Site Cleanup Fund. This provision specifies that any money paid out of the Orphan Site Cleanup Fund on account of material error in the application or accompanying documents shall be repaid to the Orphan Site Cleanup Fund. This provision also provides that any payment made to an applicant to which the applicant is not entitled constitutes an overpayment and must be repaid to the State Water Board within 30 days of written request from the State Water Board. Additionally, this provision provides that the money which is repaid shall be deposited into the Orphan Site Cleanup Fund.

SECTION 2814.37. APPEALS.

Specific Purpose and Necessity of the Proposed Action

Proposed section 2814.37 provides that if the State Water Board denies an application, the applicant may re-apply to the Orphan Site Cleanup Fund, but the applicant has no right to administratively appeal the decision. Consistent with other sections of the proposed regulations, an applicant may not re-apply, however, if the previously denied application or accompanying documentation contained a material error that was a result of fraud, misrepresentation, or other misconduct.

The duration of the Orphan Site Cleanup Fund is short. By eliminating the administrative-appeal process, an applicant may seek judicial recourse immediately after the applicant's application is rejected by the Orphan Site Cleanup Fund. Section 25299.56 establishes a comprehensive administrative-appeal process and procedures for judicial review. This section, however, only governs claims filed pursuant to sections 25299.57 and 25299.58 (claims to the USTCF). This proposed regulation is necessary to establish an Orphan Site Cleanup Fund applicant's recourse if an application is rejected by the State Water Board.